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No. 89-376

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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**QUESTIONS PRESENTED FOR REVIEW
BY PETITIONER**

1. Whether the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that the "approval" element of the government contractor defense requires proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act.

2. Whether the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), conflicts with *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) in holding that General Dynamics failed to prove the "approval" element of the government contractor defense despite undisputed facts that the government was fully aware of the alleged defects yet chose to use the product as designed for thirteen years.

3. Whether the holding by the Fifth Circuit in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) that government approval under the government contractor defense can occur only during the design stage, conflicts with the Fourth Circuit's post-*Boyle* decision in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) and the several federal circuit court decisions prior to *Boyle* that approval can occur after the design stage where the government subsequently discovers the defects yet chooses to use the product as designed.

**QUESTIONS PRESENTED FOR REVIEW
BY RESPONDENT**

1. Whether the final element of the government contractor defense can be satisfied absent proof that the government had "actual knowledge" of the dangers in the design that were known to the private design contractor.



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PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 22.5, Petitioner General Dynamics Corporation replies to Respondents' Brief in Opposition filed October 5, 1989.

At the outset, Petitioner notes that in the Brief in Opposition ("Opposition"), Respondents have proposed a fourth issue for review by this Court, thus essentially agreeing that a grant of *certiorari* is necessary. Although Petitioner disagrees that the issue is one that should be considered by this Court, Respondents' approach strengthens the argument that this case is appropriate for *certiorari*.

In the Opposition, Respondents have attempted to inject numerous facts into this case such that it appears unique and not "certworthy." This is not a factually bound case. Indeed, Respondents' Opposition underscores one of the important legal questions presented for this

Court's review: Does the "approval" element of the government contractor defense under *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) require proof that a government official performed a policy level "substantive review and evaluation" constituting a discretionary act under the Federal Tort Claims Act ("FTCA")? Contrary to Respondents' assertion, that question is a simple question of law which does not require this Court to "reexamine the record." Opposition at 12.

In *Boyle*, this Court held that the approval element of the government contractor defense assures "that the suit is within the area where the policy of the 'discretionary function' would be frustrated." 108 S. Ct. at 2518. Both parties cite this language to support their completely different positions. Petitioner asserts that this Court only intended the discretionary function exception to be the doctrinal basis for the defense. Petition at 12-14. Petitioner also contended that this Court did not intend the discretionary function exception to be included as an element of proof in demonstrating approval. In stark contrast, Respondents rely on precisely the same language in arguing that a contractor must demonstrate that the government exercised a policy level discretionary function, and that it is an element of proof for that prong of the defense. Opposition at 8. These clearly conflicting interpretations of the same phrase in *Boyle* bring into bold relief the key legal issue presented for review by Petitioner, i.e., the role, if any, the discretionary function exception of the FTCA plays in establishing the approval element of the government contractor defense.

In the Opposition, Respondents agree with Petitioner's position that there is "extraordinary tension among the federal circuits regarding the parameters of the discretionary function exception." Opposition at 10. Respondents state, however, that Petitioner "wants this Court, in one fell swoop, to resolve all conflicts on the discretionary function exception." *Id.* In fact, Petitioner's argument

is that the "extraordinary tension" and confusion among the circuits regarding the parameters of the exception is yet another reason it could not have been intended as an element of proof in demonstrating the government contractor defense.

Respondents' Opposition also makes reference to a second issue presented by Petitioner for this Court's consideration: whether approval can occur after the initial design stage. Petitioner's Brief did not specifically argue that approval took place during the design stage because the facts referenced in the Fifth Circuit decision inevitably lead to the conclusion that approval occurred during the Navy's thirteen years of use of the diving chamber. Petition at 20 n.11. The parties have agreed, however, that in attempting to carry out *its* contractual responsibility to approve the design, five Navy officials signed the relevant working drawings in the "Review and Approval" block. See Opposition at 3; Petitioner's Brief at 63a. The Fifth Circuit's holding that such a review does not constitute "approval" highlights the intrusive nature of the Fifth Circuit's approval test and further supplements the argument that *certiorari* should be granted to define and clarify the first element.¹

Finally, Respondents argue that Petitioner failed on the third element of the defense, and consequently the Fifth Circuit's judgment can be affirmed on another ground and does not merit *certiorari*. Opposition at 19. After a review of the entire record, the Fifth Circuit clearly held that Petitioner proved the third element because the Navy and Petitioner had equal and actual knowledge of the risks associated with the diving chamber. *Trevino*, 865 F.2d 1474, 1487 (5th Cir. 1989), App.

¹ See Petition at 18. (Under its approval test, the Fifth Circuit in *Trevino* examined closely the qualifications and competency of the signing military personnel in determining whether approval took place. This is the epitome of judicial "second-guessing" of military decisions.)

to Petition at 27a ("Because both General Dynamics and the Navy knew that the system as designed could create a partial vacuum, and because both the Navy and General Dynamics could see that the final design included no safety devices, liability of General Dynamics could not be based upon non-disclosure of these dangers.")² Denial of *certiorari* because other, independent grounds exist to support the lower court is not appropriate where those grounds require a conclusion contrary to the lower court. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n.11 (1975) (argument not made subject of a cross petition was not considered because it would alter the judgment of the lower court rather than providing an alternative ground for affirming it); *Langnes v. Green*, 282 U.S. 531, 539 (1931) (review of Respondents' alternate ground proper because Respondents offered no objection to the decree of the lower court). In this case, the Fifth Circuit's judgment binds Respondents unless Respondents cross petition to have that part of the decree reviewed. *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 66 (1927) (Respondents, without presenting a cross petition for *certiorari*, sought a reversal of a distinct portion of the lower court decree and were denied right of review); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937) ("Where each party appeals each may assign error, but where only one party appeals the other is

² As stated in the Petition, weighing evidence regarding the sufficiency of military decisionmaking (here, whether or not the approval of a diving chamber design by Navy officers was made with informed military expertise) requires courts to delve into matters beyond their constitutional authority and institutional competence. Petition at 18. Moreover, Petitioner was unable to explore the breadth of the Navy's prior knowledge and was precluded from presenting any evidence regarding the Navy's prior knowledge of diving chamber designs because the Navy invoked a cloak of secrecy over such information in the interest of national defense. Tr. at 11-23; 238.

bound by the decree in the court below.'") (citation omitted).

In conclusion, Respondents' argument that in order to resolve these issues "this Court will be forced to reexamine the record" clearly misconstrues the issues before this Court. Petitioner's issues all turn on discrete areas of law which are worthy of *certiorari* not only because of the conflicts created within the circuits, but perhaps more importantly because the Fifth Circuit's opinion conflicts with this Court's opinion in *Boyle*. For these reasons, and as more fully set forth in its Petition, Petitioner respectfully requests this Court grant its Petition.

Respectfully submitted,

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